

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.4095 of 1998

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For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES

2. To be referred to the Reporter or not? YES

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge? NO

CHITRA ADVERTISER

Versus

AMC

Appearance:

Shri H.M. Mehta with Shri KETAN A DAVE for Petitioners

MR PRASHANT G DESAI for Respondent No. 1

MR MB GANDHI for Respondent No. 2

CORAM : MR.JUSTICE H.L.GOKHALE

Date of decision: 11/08/98

ORAL JUDGEMENT :

Heard Shri H.M. Mehta with Shri Ketan A. Dave, learned advocates for the petitioners; Shri Prashant G. Desai, learned Government Pleader (GP) for respondent no.1; and Shri M.B. Gandhi, learned advocate for respondent no.2.

2. The petitioners herein are the advertising agencies. Respondent no.2 is also an advertising agency. The dispute raised in this petition is about the decision of respondent no.1/ Municipal Corporation dated 26.11.1996 allotting 10 sites for the purpose of signage to respondent no.2 on the terms contained therein. The submission of the petitioners is that no tender was floated for awarding this work and the decision of respondent no.1 Corporation is contrary to the law laid down in this behalf, apart from being contrary to the responsibility of the Corporation under sec.79(d) of the Bombay Provincial Municipal Corporations Act, 1949 ("the Act" for brevity).

3. When the matter first came before me on 18.6.1998, notice was directed to be issued and ad interim relief was granted in terms of prayer clause 5(C), which prevented both the respondents from executing the resolution dated 26.11.1996, and placing any hoardings/ signages in furtherance thereof. Subsequently a reply has been filed by Shri Raj Bholabhai Patel, on behalf of respondent no.2. He has filed a further affidavit also. A reply has been filed by one Shri R.R. Varsani, Deputy Municipal Commissioner (Estate) of respondent Municipal Corporation. The petitioners have filed a rejoinder and additional rejoinder.

4. Subsequently when the matter came up before me on 29.7.1998, it was thought proper that the petitioners also ought to be put to terms. This was because the work initiated by respondent no.2 had been injuncted, but the petitioners were not put to terms. Therefore, to test their bona fides, on taking a suggestion from the learned counsel appearing for the petitioners, they were directed to deposit an amount of Rs.25,000/- by 4.8.1998, by way of Demand Draft issued in the name of the Registrar. They were also asked to state their financial strength as reflected in the last two annual accounts and also to state their past experience in advertising line. Subsequently, petitioners nos.1, 2, 4 and 6 have filed necessary affidavits and deposited Rs.25,000/- as directed, in this Court.

5. Later on, when the matter reached on 4.8.1998, it was deemed fit that rule be issued making it returnable 11.8.1998, so that whatever are the rights of the parties are known to them one way or the other. All the learned counsel for the respondents have waived service of the rule. They have filed their replies as stated above. Hence the matter is being heard finally.

6. The submission of Shri H.M. Mehta, learned counsel for the petitioners is that whenever any such contract is to be awarded by a public body, all the citizens or the concerned organisations ought to have a uniform chance to participate in that endeavour. He submitted that law in this behalf has been well settled in numerous judgments. Way back in 1979, in Ramana Dayaram Shetty v. The International Airport Authority, AIR 1979 SC 1628, the Honorable Supreme Court has observed in para 12 that ;

" a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily."

In a number of judgments thereafter, this reasoning has remained undisturbed. Shri Mehta for the petitioners further submits that petitioners nos.1, 2, 4 and 6 have shown their bona fides by depositing Rs.25,000/- in this Court. They are in the same business and they should be treated equally in the matter of being given an opportunity to compete in this particular project. Shri Mehta for the petitioners has also submitted that under sec.79(d) of the Act, whenever any right belonging to the Corporation is being sold on leased or otherwise transferred, it cannot be for anything less than the current market value of such premium. Sec.79(d) referred to above reads as follows :

"the consideration for which any immovable property or any right belonging to the Corporation may be sold, leased or otherwise transferred shall not be less than the current market value of such premium, rent or other consideration."

7. Shri Mehta for the petitioners submits that admittedly some right of the Corporation is being transferred to respondent no.2 and that cannot be done for anything less than the current market value or a premium or consideration or rent that would be available on such a right.

8. The resolution passed on 26.11.1996 by the Municipal Corporation, which is challenged in this matter when translated into English reads as follows :

"Having been appraised of the entire matter as stated in the letter dated 1.11.1996 bearing Standing Committee Resolution No.1299 addressed by the Municipal Commissioner and in pursuance of letter dated 26.9.1996 received from Messrs Karina Enterprise Private Limited, Delhi through Shri Raj Bholabhai Patel regarding setting up Signages on main roads of Ahmedabad city so as to make information regarding locations and roads available to pedestrians and vehicle drivers and after considering the facts and reasons stated in the letter above referred of the Municipal Commissioner, it is resolved that the advertising rights may be given to the said Messrs Karina Enterprise Private Limited of Delhi in respect of 25 locations in Ahmedabad city (and as discussed in the Committee in respect of further locations) to set up signages at the said places at a token rate of Rs.101/- per signage per annum and to give advertising rights for a period of six years to the said Karina Enterprise Private Limited, it is hereby resolved that Municipal Commission should be so authorised in anticipation of the sanction of the Corporation."

9. As seen from the resolution, the Municipal Corporation has decided to put up signages at 25 locations in Ahmedabad city. The resolution says that advertising rights are to be given to respondent no.2 qua all these locations to set up signages at a token rate of Rs.101/- per signage per annum. The advertising rights are to be given for a period of six years. Though the resolution does not state specifically, it is stated in the affidavit in reply that the entire cost of putting signages will be borne by respondent no.2. The structure will become the property of the Corporation, but the right to advertise will remain exclusively with respondent no.2 for a period of six years. Thereafter, it will revert back to the Corporation. It is agreed between the parties that the advertisements will not be objectionable on various counts as stated in the agreement and if it is so found, the Corporation will have right to withdraw such advertisements. The purpose in putting signages is to show various destinations on half part of the Board and on the other half there will be advertisements.

10. Shri Mehta, for the petitioners points out that in para 6 of the affidavit of Shri Varsani, Deputy

Municipal Commissioner (Estate) the period mentioned is 7 years. Shri Desai, learned GP for respondent no.1 also points out that in work order dated 31.3.1998, the period of advertising rights mentioned in clause 4 thereof is 7 years. Shri Mehta, for the petitioners, therefore, states that although resolution is for 6 years, the work award is for 7 years and it is bad even on that count.

11. Shri Desai, learned GP for respondent no.1/ Municipal Corporation submits that firstly it cannot be said that any right is being transferred so as to attract sec.79(d) of the Act. Shri Desai further submits that under provisions contained in rule 2(2) in Chapter V of Schedule 'A' to the Act, the Commissioner does have power to award work without inviting tenders for reasons to be recorded in the proceedings. The Standing Committee may authorise the Commissioner. Said Rule 2(2) reads as follows :

"2(2) The Commissioner shall not be bound to accept any tender which may be made in pursuance of such notice, but may accept, subject to the provision of clause (c) of section 73, any of the tenders so made which appears to him, upon a view of all the circumstances, to the most advantageous :

Provided that the Standing Committee may authorise the Commissioner, for reasons which shall be recorded in its proceedings, to enter into a contract without inviting tenders as herein provided or without accepting any tender which he may receive after having invited them."

12. Shri Desai, learned GP for respondent no.1 has drawn my attention to the letter dated 23.10.1996 written by the Municipal Commissioner in this behalf. He has also submitted that the petitioners are approaching this Court rather late in the day because though they had represented earlier on 26.11.1997 they waited until one structure is up put up by respondent no.2 in this behalf. Shri Desai also relied upon the judgment of the Honourable Supreme Court in G.B. Mahajan and others v. The Jalgaon Municipal Council and others, AIR 1991 SC 1153, to submit that entering into agreement with the developers for finance and execution of projects of Municipal bodies is a matter of policy and such an agreement cannot be termed illegal. He also relied upon a judgement of the Honourable Supreme Court in Tata Cellular v. Union of India (1994) 6 SCC 651 and

particularly para 77 thereof, wherein it is held that :

".. it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case."

Shri Desai, learned GP for the Corporation also submitted that any order adverse in the circumstances will lead to further litigation and financial consequences for the Municipal Corporation.

13. Shri Gandhi for respondent no.2, apart from adopting the submissions of Shri Desai, learned GP for respondent no.1, submitted that respondent no.2 was a leader in this business and it was because of the past experience of respondent no.2 in this line that the Municipal Corporation had selected respondent no.2 with preference. He also submitted that in the past also in respect of similar projects being floated by respondent no.1, the petitioners have taken obstructive posture and had tried to block similar projects. Shri Gandhi for respondent no.2 submits that respondent no.2 has already invested good amount on the structures, which are to be put up. He submitted that as of now out of 25 structures, work order has been given only for 10 structures, out of which one is nearing completion; therefore, the execution of the work concerning these 10 structures should be left undisturbed. He submitted that if the petitioners are interested and if the Municipal Corporation also wants the work with respect to remaining 15 sites put to auction, it can be advertised. An affidavit has also been filed by Shri Raj Bholabhai Patel, power of attorney holder of respondent no.2, wherein he has fairly stated in para 2 thereof that :

"I say and submit that if the Corporation auctions these 15 sites and whatever the highest offer received and if that offer is more than the offer which is previously given by the deponent, then the present deponent is prepared to give the highest price so received by the Corporation for 10 sites for which, the work order is received and for that 10 sites, the work be allowed to be completed to the present deponent subject to the variation of the price that comes out in the auction proceedings of the remaining 15 sites."

Shri Gandhi for respondent no.2 submits that this Court ought not to interfere into the work order which has already been issued.

14. Having considered the submissions made by the learned counsel on both the sides, in my view, the decision arrived at by the Municipal Corporation will have to be interfered with. The decision of the Honourable Supreme Court in G.B. Mahajan's case (supra) is entirely on a different footing. That was the case where decision of the Municipal Corporation to set up project through private sector was under challenge. That was not a case where tenders were not floated. The Municipal Council had prepared a project report after enunciating various criteria for the project. It was put to tenders. Advertisements were taken out in newspapers. Five developers have responded and submitted their tenders. After process of scrutiny of the tenders, the tender of one of the developers had been accepted. It is certainly the prerogative of the Municipal Corporation to decide as to whether a particular work is to be executed through private sector, as in the present case. That cannot be challenged as held by the Honourable Supreme Court. But having arrived at that decision, all concerned have got to be treated fairly and equally.

15. The decision of the Honourable Supreme Court in Tata Cellular (supra) also does not help Shri Desai, for the reason that ultimately in that judgment also the duty to act fairly has been emphasised and the manner in which decision is taken is also required to be looked into. In the instant case although there is power in the Standing Committee to recommend to the Municipal Commissioner that a particular work be given without inviting any tenders, under provisions of rule 2(2), it is implied therein that it must be borne on record that a particular party is indispensable or that the proposal is such that even after inviting tenders there would not be any major variation in the terms. Reading any other power in the Commissioner or in the Standing Committee under particular proviso will set at naught the right of the citizens and organisations to be treated fairly in the matter of entering into contract with the Corporation. This has been emphasised by the Honuorable Supreme Court as stated above in Ramana Dayaram Shetty (supra) followed by number of judgments.

16. The submission of the petitioners with respect to sec.79 (d) of the Act is also well taken. It is ultimately the right of the Municipal Corporation to

decide as to whether any signage should be put up at particular places. It is the consideration which the Corporation is going to receive therefor must weigh while disposing of property or any right in the property. In the instant case the petitioners averred and it is very clearly contested between the petitioners and respondent no.2 that there is obviously good amount of income in this business of advertisement and if that is so, there is no reason why the Corporation should not earn therefrom which is what is canvassed by the petitioners. By the impugned decision, the Municipal Corporation will be earning nothing for a period of six years. It will get only Rs.101/- as token fee and during that period advertisers will continue to profit, whereas after six years only whatever is the status of the structure, the same will become the exclusive property of the Municipal Corporation. This is because during those six years that structure has to withstand six monsoons and various other factors. Whatever it is, the fact remains that when the commercial agencies are going to profit out of this enterprise there is no reason why the Corporation should not receive adequate consideration.

17. For the reasons stated above, the decision of the Corporation arrived at through resolution no.729 dated 1.11.1996 will have to be interfered with. There is, however, one aspect which is to be borne. On one site respondent no.2 has put up a structure and it is nearing completion. In that view of the matter inasmuch respondent no.2 is interested very much in this project, the award of the work for this particular site at Income Tax Square will remain undisturbed. That will be, however, on the terms to be decided by the Corporation for award of this work.

18. Hence for the reasons stated above, the above referred resolution and the work contract awarded to respondent no.2 is interfered with, quashed and set aside, except the award of the work for site situated at Income Tax Square. On an inquiry from me, Shri Desai, learned GP for the Corporation took instructions and stated that the Municipal authorities will take at least three weeks to float necessary tenders. On those tenders being invited all concerned will be eligible to participate. One requirement, therefore will be of depositing an amount of Rs.25,000/- (Rupees twenty five thousand only) with the Corporation. To begin with, petitioners nos.1, 2, 4 and 6 have deposited Rs.25,000/in this Court. Shri Mehta for the petitioners states that all these petitioners are interested in giving their bid. Thus, the amount deposited by them in this Court will be

transferred by the Registrar of this Court to the Municipal Corporation, on their filling necessary tender and intimating to the High court accordingly. Needless to state that on the Corporation floating the tender, whichever is the party satisfying all technical requirements and giving highest bid, will get necessary contract. Shri Gandhi for respondent no.2 has stated that, as stated above in the earlier affidavit, respondent no.2 is ready to give same price. Hence although the award of work for the place known as Income Tax Square is undisturbed; (whether respondent no.2 succeeds in the bid or not) for this particular place he will pay to the Corporation an amount equivalent to the highest bid. Shri Gandhi for respondent no.2 has drawn my attention to the undertaking given by petitioners nos.1, 2, 4 and 6 to this Court on 4.8.1998, wherein it is stated :

"If this contract is awarded to our firm, we are ready to purchase the material purchased by M/s Karina Enterprise for the purpose of this contract so as to see that it may not have to incur any losses."

That undertaking is incorporated in this judgment as binding on petitioners nos.1, 2, 4 and 6.

19. Rule is accordingly made absolute in the above terms with no order as to costs.

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